No. 22,709

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 1968

UNITED STATES OF AMERICA,

Appellant,

v.

N. A. DEGERSTROM, INC. & BOWER MACHINERY CO.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR APPELLEE N. A. DEGERSTROM, INC.

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JURISDICTION

Appellee N. A. Degerstrom, Inc., agrees that the District Court had jurisdiction of this action by virtue of 28 U.S.C., § 1346 (b), the Federal Tort Claims Act, and that this Court has jurisdiction under the provisions of 28 U.S.C., § 1291.

COUNTER-STATEMENT OF THE CASE

Appellant in its brief has advanced two contentions for the reversal of the judgment entered in this action: First, that the District Judge erroneously

held that Mr. McKelvy, the operator of the damaged loader, was a loaned servant in the government's employ at the time this accident occurred, and second, that Article 5 of the lease agreement entered into between appellant and appellee foreclosed application of the loaned servant doctrine and required that appellee bear the loss for the damage to the loader.

Appellee will discuss the second of appellant's contentions under an appropriate heading in its brief and in its counter-statement of the case will limit itself to a review of the evidence which in its view clearly required the District Court to find and conclude, as it did, that appellant reserved and exercised an exclusive right of control over the operator of the leased loader in the performance of the flood control work undertaken and under familiar principles of tort liability thus rendered itself liable for his negligence in its operation.

\- - - - - -

The City of Colfax, Washington, is located approximately 65 miles south of Spokane. It derives its supply of water for domestic purposes from

a water system that in part courses beneath the surface of the south bank of the north fork of the Palouse River (II.R. 22).[1] Sometime prior to March 7, 1965, at a point approximately one-quarter of a mile northeast of the city limits, due to erosion of the south bank of the river, a section of the water system dropped into the river resulting in an interruption of the city's supply of water (II.R. 21, 22).

To remedy the situation thus created, the Department of the Army, Corps of Engineers, through its district office at Walla Walla, Washington, undertook certain emergency flood control work in the area (II.R. 22). Mr. Frank L. Breckon was designated as project supervisor of the work to be performed which in part consisted of the removal of several culverts from the river and the rip-rapping of the south river bank for a distance of about 300 feet to prevent or at least retard the occurence of any further erosion (II.R. 22, 24, 25, 30). Mr. Breckon's function as project supervisor, according to his testimony, was "to direct how the work was to be performed" (II.R. 24).

[1] For the sake of clarity, appellee will designate its references to the record in the same manner as that followed by appellant in its brief -- "I.R." being used to refer to the Transcript of Record reproduced by the Clerk and "II.R." for reference to the Record of Proceedings at the Trial, Volume II of the Record on Appeal.

To accomplish the flood control work he was to direct and supervise, Mr. Breckon determined that he would require, among other equipment, a D8 tractor or bulldozer and a Model 988 loader (II.R. 26). After ascertaining that appellee N. A. Degerstrom, Inc., hereinafter referred to as Degerstrom, had such equipment available and was willing to lease it to the government, Mr. Breckon channeled a formal request for its acquisition by the Department of the Army's district office at Walla Walla for his use on the flood control project (II.R. 25, 26).

Thereafter, a form lease prepared by appellant captioned "Hire of Plant or Equipment by Government" was entered into with Degerstrom under the terms of which, for a consideration of $8,183.60, Degerstrom agreed to furnish a Model 46AD8 tractor and a Model 988 loader complete with operators, fuels, lubricants, and all operating supplies for use by appellant on the flood control project for a period of 100 hours (Ex. 103). Under paragraph 2 of Schedule "A", the lease provided that

> "Equipment is required for flood emergency work in the vicinity of Colfax, Washington. The mobilization and demobilization points, and the work to be accomplished in these areas will be directed by the Project Supervisor, Corps of Engineers, Colfax, Washington." (Ex. 103)

Following execution of the lease, Mr. N. A. Degerstrom, President of

[illegible]

[illegible]

[illegible]

N. A. Degerstrom, Inc., dispatched a tractor operated by Mr. S. Cupp and a loader operated by Mr. Ralph McKelvy to Colfax where they were met at a pre-arranged point by Mr. Breckon and escorted to the jobsite by him (II.R. 27-29). Degerstrom did not furnish anyone in a supervisory capacity to oversee the activities of Cupp and McKelvy at the jobsite, but left their supervision to Mr. Breckon (II.R. 28). In this connection, McKelvy testified that he was dispatched to the jobsite under the following circumstances:

"Q. What instructions did you receive from Mr. Degerstrom or from one of your superiors with the company as to what you should do on the job?

"A. Just to do as I was told.

"Q. With the machine?

"A. Yes." (II.R.122)

Once at the jobsite, Mr. Breckon gave both Cupp and McKelvy instructions concerning the work they were to perform (II.R. 29-31). The length of the shift they were to work was established by Mr. Breckon (II.R. 29). McKelvy was assigned the task of rip-rapping the south bank of the river, a process that required him to haul material stockpiled on the north bank across the bed of the river where it was then deposited and positioned according to detailed instructions that were given to him by Mr.

Breckon (II.R. 30-31, 120-121). Mc Kelvy testified that he was unfamiliar with the type of rip-rapping involved on the job and was taught how to rip-rap in the desired fashion by Mr. Breckon (II.R. 30, 120).

While the rip-rapping of the south bank was apparently the principal work performed by McKelvy, Mr. Breckon also made use of him to remove certain culverts in the area and he was otherwise at liberty to make use of McKelvy and the loader operated by him for such purposes as he saw fit, a circumstance that is clear from the following of Mr. Breckon's testimony:

"Q. I take it Mr. Breckon, from what you have told me, that Mr. McKelvy and his loader were down there on the job site to be used pretty much for whatever purpose you directed him for, if I make myself clear?

"A. I'd tell him what I wanted done, and he'd do it.

"Q. He was there to carry out such orders as you might give him?

"A. Yes." (II.R. 34-35)

On March 7, 1965, Mr. Breckon instructed McKelvy to perform certain work including the removal of culverts and the piling of rocks along or upon the banks of the river (I.R. 50, 69). While engaged in carrying out the instructions given him by Mr. Breckon, McKelvy negligently struck a submerged rock in an area of the river to which he had apparently been

summoned by Mr. Breckon and damaged the loader he was operating (II.R. 32-33). As Mr. Breckon testified,

"Q. You had directed him to the area where the culvert was located?

"A. I motioned that there was a culvert there.

"Q. In other words, he was in the process at the time this accident happened, of carrying out a request that you were making of him?

"A. Yes. I would say yes." (II.R. 32-33)

As a result of the accident the loader was damaged to the extent of $3,340.00, an amount that appellant stipulated Degerstrom was entitled to recover by way of damages if the District Court held that it was liable for the accident (II.R. 60).

The case was called for trial before the Honorable Charles L. Powell, sitting without a jury, on July 17, 1967. Evidence and arguments were concluded on the day following at which time the case was taken under advisement by the Court (II.R. 167). On September 7, 1967, the Court filed its Memorandum Decision specifying therein, pursuant to the provisions of Rule 52 (a) of the Federal Rules of Civil Procedure, that the decision would constitute the Findings of Fact in the case (I.R. 44, 52).

In summary the District Court held in its Memorandum Decision that at the time of the accident resulting in the damage to the loader McKelvy was

a loaned servant in appellant's employ for whose negligence appellant was liable under both common law principles of liability and the provisions of Article 5 of the lease agreement.

Following the entry of appropriate Conclusions of Law (I.R. 59-60) and an order adding Bower Machinery Company the owner of the loader involved, as a nominal party plaintiff (I.R. 56), the District Court entered a judgment which simply awarded Degerstrom money damages in the amount of $3,430.00 plus costs, (I.R. 59-60) from which appellant filed a timely Notice of Appeal (I.R. 71).

ARGUMENT

1. BASED ON SUBSTANTIAL EVIDENCE THE DISTRICT COURT CORRECTLY FOUND THAT McKELVY WAS A LOANED SERVANT IN APPELLANT'S EMPLOY AT THE TIME THIS ACCIDENT OCCURRED.

This Court, in common with most if not all others that have considered the question, has held that the element of control is the cardinal consideration in determining whether a servant in the general employ and pay of one person becomes the servant of another to whom he has been loaned or hired so as to render that other liable for the servant's negligence in the performance of work entrusted to him. In McCollum v. Smith, (9th Cir., 1965) 339 Fed. (2d) 348, under facts not dissimilar from those involved in this case, this Court held, as a matter of law, that the operator of a leased

crane was a loaned servant in the lessee's employ insofar as negligence in the operation of the crane was concerned, and said

> "'When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect to his acts in that service, is to be dealt with as the servant of the latter and not of the former.'"
>
> "In deciding this issue, a factor usually considered to be controlling is the location of the power to control the servant, for responsibility is regarded as a correlative or power. The Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S. Ct. 252, 53 L.Ed. 480 (1909); Chicago, Milwaukee & St. Paul Ry. Co. v. City of Tacoma, 7 F.2d 586 (9th Cir. 1925); Western Marine & Salvage Co. v. Ball, 59 App.D.C. 208, 37 F.2d 1004 (1930); Nepstad v. Lambert, 235 Minn. 1, 50 N.W.2d 614 (1951); 17 A.L.R.2d 1388, 1393, § 2."

The law of the State of Washington is in full accord with the rules this Court applied in the McCollum case, supra, for determining when and under what circumstances the loaned servant doctrine is applicable. Davis v. Early Constr. Co., 63 Wn. (2d) 252, 386 Pac. (2d) 958 (1963); Nyman v. MacRae Bros. Constr. Co., 69 Wn. (2d) 285, 418 Pac. (2d) 253 (1966).

Insofar as the element of control in this case is concerned , appellant would have this Court believe that it exercised no more control over McKelvy than did the home owner in the hypothetical example referred to at page 17 of its brief who hired a bulldozer, complete with operator, and was held liable for damage to the machine caused by the operator's negligence simply for having told the operator where to place excavated material. If a parallel is intended between that situation and this, it badly misses the mark, as is apparent from the District Court's Memorandum Decision which constitutes the Findings of Fact in the case.

Bearing on a consideration of whether appellant or Degerstrom exercised control over McKelvy at the time the accident resulting in the damage to the loader occurred, the District Court, based on substantial evidence, and we do not understand appellant to contend otherwise in its brief, made the following Findings of Fact, all of which appear at page 7 of the decision (I.R. 50):

(1) "That Degerstrom retained no control over him and the method in which he would operate the machine . . ."

(2) "The machine, the loader, was to be operated under the direction of the 'Project Supervisor, Corps of Engineers.'"

(3) "Mr. McKelvy was directed to work when and where Mr. Breckon told him to . . . "

(4) " . . . that Mr. McKelvy was the servant of the United States of America at the time of the accident and was under its direction and therefore his actions made the government liable."

As this Court is well aware, findings of fact are presumptively correct and will not be set aside unless "clearly erroneous." The burden of demonstrating that findings are clearly erroneous rests heavily on the party challenging them. As this Court is equally well aware, it is under no obligation to search the record in appellant's behalf for evidence on which to base new or different findings in this case and in light of the provisions of Rule 52 (a) of the Federal Rules of Civil Procedure has consistently refused to do so even in cases decided by district courts on written records.

Lundgren v. Freeman, (9th Cir., 1962) 307 Fed. (2d) 104;

Brucker v. U.S., (9th Cir., 1964) 338 Fed. (2d) 427;

Santa Anita Mfg. Corp. v. Lugash, (9th Cir., 1966) 369 Fed. (2d) 964.

Significantly, not only has appellant failed to demonstrate that the Findings of Fact made by the District Court are clearly erroneous, it has failed to so much as challenge these Findings on that basis. As a result, we earnestly urge that appellant should be and is bound by the District Court's Findings of Fact establishing that McKelvy was a loaned servant in its employ at the time the accident occurred.

Independently, however, of the District Court's Findings of Fact concerning McKelvy's status as a loaned servant, appellee is confident that a review of the record will convince this Court that the result reached in the court below is fully justified and was clearly required in view of this court's decision in McCollum v. Smith, (9th Cir., 1964) 339 Fed. (2d) 348, and the following decisions of the Washington State Supreme Court on which the District Court relied in deciding the case, observing in the process that there were no appreciable differences between federal and Washington law on the issue involved (I.R. 49):

B & B Bldg. Material Co. v. Winston Bros. Co., (1930) 158 Wash. 130, 290 Pac. 839;

McHugh v. King Co., (1942) 14 Wn. (2d) 441, 128 Pac. (2d) 504;

Davis v. Early Constr. Co., (1963) 63 Wn. (2d) 252, 386 Pac. (2d) 958;

Nyman v. MacRae Bros. Constr. Co., (1966) 69 Wn. (2d) 285, 418 Pac. (2d) 253

Appellant in its brief, however, has seemingly taken the position that because the operational details of the loader, a valuable piece of equipment, which took some skill to operate, were left to McKelvy, the District Court was in error in determining that the loaned servant doctrine

was applicable.

Obviously, the actual operation of any piece of heavy equipment, the value of which is generally substantial, is a one-man job that as a matter of common knowledge usually requires some special skill or training on the part of its operator. If actual participation by a lessee in the operation of such equipment were a prerequisite to the application of the loaned servant doctrine, or the fact that such equipment was valuable and could only be operated by a person with some special skill or training prevented its application, it is difficult, if not impossible, to conceive of any situation to which the doctrine could apply. Yet, it is frequently applied to situations involving the leasing of fully operated heavy equipment. Annotation, 17 A.L.R. (2d) 1388.

In the final analysis, regardless of the value of such equipment, the skill required to operate it, or the fact that its operational details rest with the operator, the true test for determining whether the operator becomes the servant of a person to whom he and machine have been leased is and remains, as this Court pointed out in McCollum v. Smith, (9th Cir., 1964) 339 Fed. (2d) 348, quoting with approval from the case of Nepstad v. Lambert, (Minn., 1951) 50 N.W. (2d) 614, " . . . which employer had the right to control the particular act giving rise to the injury." In this case the record establishes and the District Court found, as a matter of fact, that

appellant, to the exclusion of Degerstrom, had control over McKelvy at the time the act causing the damage to the loader occurred.

Appellant has cited no authority in its brief which suggests or employs a different test. And, insofar as appellant's reliance on Restatement (Second), Agency, § 227, is concerned, we think it is misplaced. Fairly read, section 227 is simply authority for the proposition that whether the loaned servant doctrine is appliable in a given case is generally, as it was in this case, an issue of fact to be decided by the trier of the facts. Restatement (Second), Agency, § 227, p. 500.

Regarding appellant's contention that the lack of signals from Mr. Breckon is fatal to the District Court's determination that McKelvy was a loaned servant, appellee does not regard that signals are necessary to the doctrine's application under the circumstances of this case or for that matter in any case. Moreover, the contention overlooks or ignores the following of Mr. Breckon's testimony which, in appellee's view, establishes that the practical equivalent of a signal was being given by Mr. Breckon at the time of the accident:

"Q. In other words, he was in the process at the time this accident happened, of carrying out a request that you were making of him?

"A. Yes. I would say yes." (II.R. 32-33)

Fairly summarized, the facts in this case disclose a situation in which appellant leased a fully operated loader, reserving in the lease agreement the right to direct and control the work to be performed by the operator. It fully exercised that right on the jobsite in the person of its project supervisor who used both the operator and the loader in a manner no different than either would or could have been used had appellant owned the loader and directed its use by an operator in its regular employ. As Mr. Breckon testified concerning his use of McKelvy and the loader operated by him, "I'd tell him what I wanted done, and he'd do it." (II.R. 35).

Under such circumstances appellee submits that the District Court correctly found that McKelvy was in fact a loaned servant in appellant's employ for whose negligence it should be held liable.

2. UNDER THE PROVISIONS OF ARTICLE 5 OF THE LEASE AGREEMENT APPELLANT IS LIABLE FOR THE NEGLIGENCE OF A LOANED SERVANT.

Appellant has argued at some length in its brief that under the provisions of Article 5 of the lease agreement appellee should bear the loss for the damage to the loader. It reaches this conclusion through a process of interpolation by reading Article 5 as though it were written to limit the government's responsibility for damage caused to leased equipment to that which

results from the negligence of its regular employees. Article 5, however, does not so provide, but contains a clear agreement on appellant's part that

> " . . . damage caused to . . . equipment by the acts of the Government, its officers, agents or employees, will be the responsibility of the Government in accordance with applicable Federal laws."

The District Court concluded that the term "employee", as used in the quoted portion of Article 5, when considered in connection with applicable federal law, included a loaned servant (I.R. 51). Its conclusion in this regard rests on a sound basis.

Applicable federal law, the Federal Tort Claims Act, 28 U.S.C., § 1346 (b), under which this action was brought, provides for the government's liability as to any loss " . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant . . ."

The definition of the term "employee" as used in the Act includes a person temporarily acting on behalf of a federal agency, 28 U.S.C., § 2671, and has been specifically held to include a loaned servant. Martarano v. U.S., (Nev., 1964) 231 Fed. Supp. 805.

Appellee submits that the District Court correctly concluded that

appellant's agreement in Article 5 to be responsible for damage caused to a contractor's equipment by the acts of its employees included as well an undertaking on its part to assume liability as to any such damage caused by a loaned servant.

Appellant maintains at page 8 of its brief, however, that the use of the word "employee" rather than "servant" indicates an intent on its part to exclude liability for the negligence of a loaned servant. The terms servant and employee are synonymous, and this Court has so held, pointing out that wherever either is used in an agency context, the usual rules of respondeat superior are to be applied. Burcker, v. U.S., (9th Cir., 1964) 338 Fed. (2d) 427.

If appellant under the provisions of Article 5 intended to exclude liability on its part for damage caused to leased equipment by a loaned servant, it should have given clear expression to that intent. This it failed to do, if in fact, that was its intention. Appellant, after all, drafted Article 5 and under familiar rules of construction the language used by it, if doubtful or susceptible of more than one meaning, should be strictly construed against it.

Caterpillar Tractor Co. v. Collins Machinery Co., (9th Cir., 1960) 286 Fed. (2d) 446;

Reconstruction Finance Corp. v. Sullivan Mining Co., (9th Cir.,

1956) 230 Fed. (2d) 247

However, even without applying a strict construction to Article 5 and attributing to the language used therein its ordinary, every-day meaning, this Court should affirm the imposition of liability on appellant by reason of its agreement in Article 5 to accept responsibility for damage caused to leased equipment by the acts of government employees, terminology which, as appellee has shown, includes a loaned servant.

CONCLUSION

The District Court correctly found that McKelvy was a loaned servant in appellant's employ at the time this accident occurred and correctly concluded that Article 5 of the lease agreement rendered appellant liable for negligence on his part while acting within the scope of his employment. Appellee respectfully submits that the judgment entered by the District Court should be affirmed.

Respectfully submitted,

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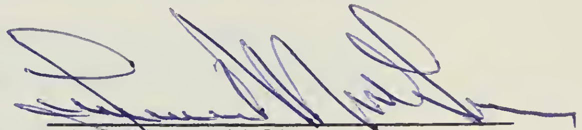
CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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